No. 15,695

United States Court of Appeals

For the Ninth Circuit

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Appellant,

vs.

HOMER CUNNINGHAM, JESS GULLETT and PERCY LAUDINGHAM,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

JAMES P. SHOVLIN, JR.,
244 Kearny Street,
San Francisco 8, California,
Attorney for Appellant.

Subject Index

Table of Authorities Cited

No. 15,695

United States Court of Appeals

For the Ninth Circuit

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,
Appellant,

vs.

HOMER CUNNINGHAM, JESS GULLETT and PERCY LAUDINGHAM,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE ORDER AND JUDGMENT OF DISMISSAL OF THE FIRST CAUSE OF ACTION AGAINST DEFENDANTS AND APPELLEES HOMER CUNNINGHAM, JESS GULLETT AND PERCY LANDINGHAM.

The complaint in the first cause of action against appellees alleged that plaintiff and appellant is a corporation organized and existing under the laws of the State of Minnesota and is a resident of said

state; that the defendant Fidelity & Casualty Company of New York is a corporation organized and existing under the laws of the State of New York and is a resident of said state; that the individual defendants and appellees are residents of the State of California (Pars. I and III of the Complaint, Tr. pp. 3-4); that plaintiff and appellant insured Ben Mast Lumber Company for liability imposed upon said insured by law for personal injuries and death caused by the negligence of said insured's employees; and that upon the trial of the said Rasmussen action against said insured employer, as the result of the negligence of its employees acting within the course and scope of their employment by said insured, a judgment was entered on June 29, 1955, in favor of the heirs of one Wilbur C. Rasmussen as the result of the negligence of the employees of appellant's said insured for the sum of $75,000 and costs (Pars. V to VII, Tr. pp. 4-6); that it is uncontradicted that said Rassmussen suit resulting in said judgment against appellant's said insured was based solely upon the complaint that, not said insured, but the employees of said insured carelessly used, caused to be used, maintained and operated log conveying equipment, and that by reason of such carelessness a large log, being conveyed by said log conveying equipment, was caused to and did violently strike said Rasmussen; that said complaint in the Rasmussen action did not in any wise, other than under the doctrine of *respondeat superior,* charge appellant's insured, Mast Lumber Company, with any negligence;

that none of the employees of Mast was served with process in said Rasmussen action or appeared therein, and the judgment was rendered solely against said Mast Lumber Company; that said appellant, under the terms of its policy issued to said Mast Lumber Company, paid said judgment with interest, costs and expenses totalling $80,263.62 on August 17, 1956 (Tr. pp. 12-13); that the complaint herein was filed in the District Court on August 23, 1956, by appellant, as subrogee of Mast, to recoup said loss.

That, as appears from the foregoing, the District Court had original jurisdiction of this action for indemnity or restitution brought by plaintiff and appellant as subrogee of its said insured, Mast Lumber Company, not only under the general law but also pursuant to Condition 10 of appellant's policy issued to said Mast Lumber Company covering subrogation (Tr. p. 10), appellant having made the payment on behalf of Mast under its policy.

As heretofore indicated by the pleadings, as provided in Sections 1331 and 1332 of Title 28, United States Code Annotated, the District Court had original jurisdiction of this action as it appears the matter in controversy exceeds the sum of $3000 and the action is between citizens of different states.

The order and judgment of dismissal of appellant's first cause of action against the individual employees is a final decision of the District Court of the United States as to the first cause of action of appellant against appellees, the individual employees (Tr. pp.

15-16). Under the provisions of Section 1291 of Title 28, U.S.C. Ann., this Court is given jurisdiction of appeals from all final decisions of the District Courts of the United States.

II.

CONCISE STATEMENT OF THE CASE.

The facts as to the pleading of Appellant in the preceding division hereof, in the interests of conciseness will not be repeated, as the order and judgment of the District Court sought to be reviewed is one of dismissal of appellant's first cause of action, given on appellees' motion to dismiss "because said complaint fails to state a claim against these moving defendants upon which relief can be granted" (Tr. p. 8). In support of said motion, appellees' attorney filed points and authorities declaring that "the action is apparently maintained by the plaintiff, as the alleged subrogor (sic) of the Ben Mast Lumber Company", and that as to this cause of action defendants seek a judgment upon the grounds that the action is barred "by the applicable statute of limitations contained in the laws of the State of California" (Tr. 11).

Appellant's attorney also filed an affidavit in opposition to the motion to dismiss (Tr. 12-13) averring that the Rasmussen heirs' suit, upon which their judgment was obtained against Mast Lumber Co. alone, was upon a complaint that, not Mast, but the

employees of Mast, acting within the scope of their employment, negligently caused the injury to and resulting death of Rasmussen and that said complaint in said action did not, in any wise, other than under the doctrine of *respondeat superior,* charge Mast or Mast Lumber Co. with any negligence; that none of the employees of Mast was served with process in said suit or appeared therein as parties defendant.

After hearing and argument, the trial judge held that the one year statute of limitations was applicable and granted appellees' motion to dismiss as to appellees.

Appellant thereupon duly and timely brought this appeal from the judgment and order of dismissal (Tr. pp. 16-20).

The questions involved are whether appellant's complaint against appellees is an action "for injury to or death of one caused by the wrongful act or neglect of another" or upon a contract, obligation or liability not founded upon an instrument of writing, and when did the cause of action of plaintiff's insured accrue.

III.

SPECIFICATION OF ERRORS.

1. The trial Court erred in holding that Section 340(3) of California Code of Civil Procedure is applicable to appellant's cause of action against the appellees, instead of Section 339(1) of that code.

2. The trial Court erred in obviously holding that appellant's cause of action was one "for injury to or for the death of one caused by the wrongful act or neglect of another", a necessary prerequisite to the application of said Section 340(3), instead of one "upon a contract, obligation or liability not founded upon an instrument of writing" (Sec. 339(1)).

3. The trial Court erred in obviously holding that the cause of action of appellant's insured and subrogor accrued at the time of the injury and death of Rasmussen, rather than after a *loss* was paid by Mast Lumber Co. or on its behalf by appellant as its insurer.

Note. As these errors specified are each so interwoven in relation to the trial judge's holding that the appellant's cause of action against appellees was barred by the statute of limitations, counsel in his argument has been impelled to consider and discuss each of them throughout.

ARGUMENT.

In the proceeding culminating in the order and judgment of dismissal appealed from, there is absolutely no conflict in the *facts* presented to the trial Court in the complaint (Tr. pp. 3-6), the motion, affidavit and supporting points and authorities of appellees (Tr. pp. 8-11) or the opposing affidavit of appellant's attorney (Tr. pp. 12-13).

It appears, uncontradicted and unchallenged, that the Rasmussen accident occurred March 9, 1951; the

heirs brought suit against Mast Lumber Co. and its employees for injury to and death of their decedent on March 8, 1952, based upon the alleged negligence of Mast's employees, no charge of liability or negligence was made against Mast other than under the *respondeat superior* doctrine; none of the employees of Mast (appellees herein), who, in the instant action, were alleged (Comp. Par. V, Tr. p. 4) to have so negligently used and loaded the Green truck while acting in the course of their employment by Mast, that as a proximate result of their negligence Rasmussen was killed, was served or appeared as parties in said suit, and the judgment therein was rendered solely against Mast Lumber Co., which judgment was paid, with interest and costs, a total of $80,263.62, on August 17, 1956, and the present suit commenced by plaintiff on August 23, 1956, as subrogee under its policy covering Mast, but not its employees (Tr. p. 10) (Record "Exh. B", p. 12).

A.

OBVIOUSLY APPELLANT'S ACTION AGAINST APPELLEES CANNOT BE CONSTRUED TO BE FOR DAMAGES FOR NEGLIGENT INJURY OR DEATH OF RASMUSSEN AND THEREFORE THE PROVISIONS OF SEC. 340(3) CANNOT BE INVOKED UNDER AS A LIMITATION OF ACTION AGAINST APPELLANT.

Neither Ben Mast Lumber Co. nor appellant is within the statutory designation of those named by Section 377 of the California Code of Civil Procedure as authorized to maintain such action for wrongful death. However, this Court and the Supreme Court

of the State of California have long recognized the cause of action of an innocent employer who, solely under the doctrine of *respondeat superior,* has sustained a *loss* paid by reason of the negligence of an employee against such employee, to recover such *loss* under an *implied* contract of *indemnity.*

To emphasize the importance of this contention, especially in view of the total absence of any conflict in the *facts* involved, the liberty is taken to quote from the pertinent parts of both pertinent sections of the California Code of Civil Procedure on limitations of action:

Section 340 (limiting to one year) "3. An action . . . for injury to or death of one caused by the wrongful act or neglect of another. . . ."

Section 339 (limiting to two years) "An action upon a contract, obligation or liability not founded upon an instrument of writing. . . ."

It is apparent therefore that appellant's cause of action, as subrogee of its insured, is based solely upon the implied right of an innocent employer to recoup its loss, caused by the unauthorized negligent act of its employees, from such employees, as will be further expounded in the following division of this argument.

B.

A PERSON, WHO, WITHOUT PERSONAL FAULT, HAS BECOME SUBJECT TO TORT LIABILITY FOR THE UNAUTHORIZED AND WRONGFUL CONDUCT OF ANOTHER, IS ENTITLED TO INDEMNITY FROM THE OTHER FOR EXPENDITURES PROPERLY MADE IN THE DISCHARGE OF SUCH LIABILITY.

This principle, set out in Sec. 96, Restatement of the Law of Restitution has been followed and adopted by this Court and the Supreme Court of the State of California, even extending the same right and cause of action to the insurer of such innocent person, who has been held subject to tort liability, against the wrongdoer for expenditures properly *made* in discharge of its insured's liability.

Canadian Indemnity v. U.S. F. & G. Co., 213 Fed. 2d 658 in which the decision of Judge Edward P. Murphy of United States District Court, Northern District, Southern Division, California, was affirmed by this Court, approved the principle for which appellant is contending. This Court in that decision held that a driver's employer, who had not been at fault, could recoup from the driver for the *loss* sustained by said employer as a result of its liability for damages from the negligent operation of the motor vehicle, and that the employer's insurer, as subrogee, had a cause of action against such negligent employee to recoup such loss. This Court's opinion, referred to the earlier case of *United Pacific Ins. Co. v. Ohio Cas. Ins. Co.,* 72 Fed. 2d 836, 840, announcing the same principle and in footnote 5, states:

> "An employer against whom a judgment has been rendered for damages occasioned by the un-

> authorized negligent act of an employee *may recoup his loss* in an action against the negligent employee." (Citing *Johnston v. City of San Fernando,* 35 Cal. App. 2d 244, 246, 95 P. 2d 147, and *Myers v. Tranquility Irr. Dist.,* 26 Cal. App. 2d 385, 387, 79 P. 2d 419.)

In the last cited *Myers* case, the California appellate Court stated:

> "It is the law in California that an employer against whom a judgment has been rendered for damages occasioned by the unauthorized act of negligence of his employee MAY RECOUP his *loss* in an action against the negligent servant" citing *Bradley v. Rosenthal,* 154 Cal. 420, *infra.*

In this Court's decision in the *Canadian Indemnity* case, *supra,* in Syllabus 1 of its opinion, it definitely holds that the agent or servant of an employer, the latter being without fault, has a duty to *reimburse* his employer and that the employer, under such circumstances, may *recoup his loss* from its employee (citing *Bradley v. Rosenthal,* 154 Cal. 420; *Popejoy v. Hannon,* 37 Cal. 2d 159; and *Spruce v. Wellman,* 98 C.A. 2d 158). It further held that the insurer for such innocent employer, who had no liability except under the theory of *respondeat superior* for his employee's negligence, had the right, under subrogation to *recoup the loss* paid by such insurer in the premises.

The principle for which we contend—that an innocent employer has a cause of action for indemnity or restitution against his negligent employees which has

resulted in a judgment against the employer—after such employer has paid the judgment and thereby sustained a *loss,* is first indicated by the California Supreme Court in the case of *Bradley v. Rosenthal,* 154 Cal. 420, 424, 97 P. 875, in which that Court said:

> "Upon the general question here presented as to the correlative rights of master and servant, principal and agent, to indemnity, Cooley thus clearly enunciates the well-settled principle (1 Cooley on Torts, 3d ed. p. 255): 'A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself."

The California Supreme Court in *Continental Casualty v. Phoenix Constr. Co.,* 46 Cal. 2d 423, 296 P. 2d 801, announces the pertinent principle herein involved, as follows:

> "(1) Where a judgment has been rendered against an employer for damages occasioned by the unauthorized negligence of his employe, the employer may recoup his loss in an action against the negligent employe" (p. 428) (citing, among others, Rest. Restitution, 418-419, Sec. 96; 35 Am.

> Jur. 530-531, Sec. 101; 56 C.J.S. 502, Sec. 79;) * * * "that is, as between employer and employe is such a situation, the obligation of the employe is primary and that of the employer secondary" (p. 429).

The California Supreme Court further in this case enunciates the principle (p. 429, Syll. 2):

> "Under equitable principles of subrogation, the insurer of the employer who has been compelled to pay the judgment against the employer may recover against the negligent employe or the employe's insurer. (*Canadian Indemn. Co. v. United States F. & G. Co.* (1954, 9 Cir.), 213 F. 2d 658, 659; see also *Maryland Cas. Co. v. Employers Mut. Liab. Ins. Co.* (1953), 208 F. 2d 731; *United Pacific Ins. Co. v. Ohio Cas. Ins. Co.* (1949, 9 Cir.), 172 F.2d 836, 840 (note 5), 846-848.)"

The California Supreme Court thus recognized and followed the decisions of this Court extending to the employer's insurer, under the equitable principles of subrogation, as well as the express agreement in appellant's policy (Condition 10, Tr. p. 10), the right to recover from its insured's negligent employees, the loss sustained and paid by it by reason of the judgment against its insured employer.

It may be well to point out that, according to Exhibits A and B, respectively, the policy of Fidelity issued to its insured Green and that of appellant issued to Mast Lumber Co. attached to and made a part of the affidavit of their counsel in support of their motion to dismiss, the Green policy covered the lia-

bility of Mast as well as his negligent employees while the Mast Lumber Co. public liability policy did not extend coverage to its employees. Furthermore, the Green policy, being a motor vehicle liability policy, irrespective of its terms, includes therein the provisions of section 415 of the California Vehicle Code, which requires that every motor vehicle liability policy shall meet the following requirements:

> ". . . (2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured."

In the recent case of *Wildman v. Govt. Employees' Ins. Co.,* 48 Cal. 2d 31, 39-40, 307 P. 2d 359, the California Supreme Court held that said Section 415, Vehicle Code must be considered a part of every motor vehicle liability policy.

It must be acknowledged that this principle emphasizing the right of an innocent employer to *recoup his loss* against a negligent employee because of a liability imposed upon the employer, implies that, before the employer's right of action can *accrue* he must have *paid* the judgment against him otherwise he would not have incurred a *loss,* and he would have no accrued cause of action against the negligent employee. Certainly a cause of action for indemnity against *loss* cannot accrue until the loss is incurred and *paid.*

Sec. 2778, California Civil Code, provides (in its pertinent parts) as follows:

> "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: . . .
>
> 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof."

Thus, by statutory law of California, appellant would have not an *accrued* action against appellees until it had paid the sum for which it claims indemnity against claims, demands, damages or costs. This is in consonance with the general view of the decisions. Otherwise, as in the case at bar, appellant or its insured, without payment of the Rasmussen judgment, could have recovered from appellees and their insurer without having actually sustained a *loss* but merely a liability.

In its order granting appellees' motion to dismiss the action against appellees, the trial Court based its conclusion that the one year statute of limitations (Sec. 340 (3), Cal. Code of Civil Procedure) is applicable to appellant's cause of action, on the case of *Aetna Cas. & Ins. Co. v. P. G. & E. Co.,* 41 Cal. 2d 785 (Tr. p. 14).

This case is obviously quite foreign to the question here involved. There it was only considered and determined by a four to three decision that an employer, as statutory subrogee of the employee's cause of action for damages against a third party *for injuries to the employee,* is limited by the one year statute.

In the case at bar, we emphasize that the employer's right of action against the employee, for damages as the result of liability imposed upon the innocent employer by reason solely of the doctrine of *respondeat superior,* is not an action in tort but one for indemnity or restitution, implied by law, which does not *accrue* until the loss, if any, has been sustained and *paid* by the non-negligent employer.

In this *Aetna* case the provisions of the California Labor Code, Sections 3852 and 3854, were primarily involved.

Section 3852 provides:

> "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents."

Section 3854 of the California Labor Code provides that in an action prosecuted by the employer alone

> "* * * After recouping himself for such special damages, together with a reasonable attorney's fee fixed by the court, *which shall be based solely upon the services rendered by the employer's*

attorney in effecting recovery for the benefit of the employee, the employer shall pay any excess to the injured employee or other person entitled thereto.'' (Emphasis added.)

It is thus support for the majority decision in that case that, unlike the case at bar, the employer was there prosecuting the *same* cause of action for damages for injury to the employee as that which the employee had. Such cause of action would be governed by the one year statute of limitations, Section 340(3) C.C.P., covering an action "for injury to or for the death of one caused by the wrongful act or neglect of another."

In the case at bar, however, we respectfully urge that Section 339(1) of said Code, providing for a two year limitation of action, governs the case at bar as "an action upon a contract, obligation or liability not founded upon an instrument of writing," and that such cause of action, being one for indemnity or restitution, brought by an innocent employer against his negligent employees, does not *accrue* until the employer (or his insurance carrier on his behalf) *pays* the *loss* on August 17, 1956, which is six days prior to the commencement of this action in the District Court (Tr. pp. 6, 8, 13).

CONCLUSION.

From the undisputed facts in the record herein and under the law and decisions cited herein, the trial Court erred in apparently determining that appellant's cause of action against appellees was an action in tort for damages for the injury to and death of Rasmussen. However, the cited authorities recognize the established right of an innocent employer, who was held liable for the unauthorized negligence of his employees, to sue the negligent employees upon their implied obligation, contract or liability to indemnify him for his loss. Such right of recoupment, indemnity or restitution cannot accrue until the employer sustains the *loss*. Such right is founded upon equitable and legal principles, well established, that one whose negligent conduct, unauthorized by his employer, which results in a loss imposed upon such innocent employer, is liable in law and equity to indemnify and repay to such employer the *loss* which he sustained and paid by reason of such negligence. Further, under the cited decisions, upon payment by the employer's insurer of such loss, the latter is subrogated to all the rights of the employer to *recoup such loss.*

Appellant's cause of action, as such subrogee, was based upon an implied, unwritten, contract, obligation or liability of appellees which did not accrue until six days before the suit herein was filed, when the judgment against its insured was paid, and the controlling statute of limitations of such action for indemnity, restitution or recoupment is obviously Section 339(1) of the California Code of Civil Procedure

providing that an action upon such implied contract be brought within two years after the cause of action accrued.

It is therefore respectfully prayed that the order and judgment of dismissal be reversed.

Dated, San Francisco, California,
January 27, 1958.

Respectfully submitted,
James P. Shovlin, Jr.,
Attorney for Appellant.

(Appendix Follows.)

Appendix

Exhibits part of the Record.